

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 14, 2002 Session

DANA GENUA v. EMORY ASSOCIATES, ET AL.

**Appeal from the Circuit Court for Knox County
No. 1-704-97 Dale C. Workman, Judge**

FILED APRIL 26, 2002

No. E2001-01139-COA-R3-CV

The plaintiff challenges the adequacy of a jury verdict. The defendant Edward Sanchez points us in a different direction; he contends that the trial court erred when it denied his motion for a directed verdict. This litigation started when Dana Genua sued Emory Associates (“the partnership”) and Sanchez – respectively the former and present owners of a tract of property situated near the plaintiff’s land – seeking to recover for flooding damage to the plaintiff’s property allegedly caused by surface water run-off from the defendants’ property. The jury returned a verdict for the plaintiff, awarding him \$15,000 in damages against the partnership and \$10,000 as to Sanchez. The plaintiff then filed a motion for an additur or a new trial on the issue of damages, and the partnership and Sanchez each filed a motion to set aside the verdict and for a directed verdict. The trial court denied all motions, approved the verdict, and enjoined Sanchez from continuing the nuisance. The plaintiff appeals, arguing that the damage awards are below the lower limit of the range of reasonableness. Sanchez raises the additional issue of whether the trial court erred in denying his motion to set aside the verdict and for a directed verdict.¹ We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Affirmed; Case Remanded**

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HOUSTON M. GODDARD, P.J., and D. MICHAEL SWINEY, J., joined.

W. Andrew Fox and Jack W. Bowers, Knoxville, Tennessee, for the appellant, Dana Genua.

David L. Buuck, Knoxville, Tennessee, for the appellee, Emory Associates.

John T. Johnson, Jr. and John E. Winters, Knoxville, Tennessee, for the appellee, Edward Sanchez.

¹The partnership raises two issues on this appeal that address what should happen in the event we determine the issue of the adequacy of the damages in favor of the plaintiff. Since we have resolved this issue against the plaintiff, we do not address the partnership’s conditional issues.

OPINION

I. *Facts*

In 1980, the plaintiff purchased a house located on Emory Road in Knoxville. Later, in 1990, Sanchez purchased a large tract of land that was situated near, and at a higher elevation from, the plaintiff's property. Sanchez formed a partnership, Emory Associates, with Richard LeMay and John Munson in 1992, and shortly thereafter, Sanchez transferred the property to the partnership. The partnership was formed for the purpose of developing the land as a residential subdivision.

Construction began on the subdivision in 1993. This construction included the grading and denuding of several acres of land that were located northeast of the plaintiff's property. House sales in the subdivision began to decline in the mid-1990's, and on April 8, 1998, the partnership re-conveyed the remaining undeveloped property to Sanchez.

While the partnership still owned the property, on July 1, 1997, heavy rains occurred in East Tennessee, including in the Emory Road area. As a result, the plaintiff experienced massive flooding on his property that caused a great deal of damage to his house and personal property. The plaintiff's property was flooded on four other occasions after the property was re-conveyed to Sanchez: April 17, 1998; April 19, 1998; May 14, 1998; and June 28, 1999. Each of the four subsequent floods caused damage to the plaintiff's property.

The plaintiff filed suit against both the partnership and Sanchez, claiming that the defendants were responsible for the flooding due to the grading and denuding of their acreage, which, according to the plaintiff, resulted in an increased flow of water onto the plaintiff's property. In addition to seeking money damages, the plaintiff asked the court to issue an injunction against Sanchez requiring him to abate the nuisance. Following a trial, the jury returned a verdict in favor of the plaintiff, finding that both the partnership and Sanchez were responsible for a portion of the damage caused by the five floods. The jury awarded the plaintiff \$15,000 in damages against the partnership and \$10,000 in damages against Sanchez. In addition, the trial court enjoined Sanchez from continuing the nuisance. Plaintiff appeals. All parties raise issues for our consideration.

II. *Standard of Review Regarding Adequacy of Jury Verdict*

In *Miller v. Williams*, 970 S.W.2d 497 (Tenn. Ct. App. 1998), this court dealt with the issue of the adequacy of a jury verdict. We addressed our standard of review in such a case as follows:

In this case, we must decide if the record contains “material evidence to support the [jury’s] verdict.” Because Miller asserts that the jury’s award is insufficient, our focus is on the “lower limit” of the “range of reasonableness.” In the *Foster* case, the Supreme Court stated that

[a] reasoned examination of the credible proof of damages leads to a determination of the figure beyond which excessiveness or inadequacy lies and beyond which there is no evidence, upon any reasonable view of the case, to support the verdict.

In reviewing the adequacy of the jury's award, we note that

[the determination of] the amount of compensation in a personal injury case is primarily for the jury, and that next to the jury, the most competent person to pass on the matter is the trial judge who presided at the trial and heard the evidence.

The effect of a trial court's approval of the amount of a jury award is clear:

... the trial judge's approval of the amount of the jury's verdict invokes the material evidence rule, just as it does with respect to all other factual issues upon which appellate review is sought

* * *

"[a]ll of the evidence in the record that tends to support the amount of the verdict should be given full faith and credit upon appellate review."

Thus, our analysis is limited to a determination of whether the record reflects material evidence demonstrating that the jury's award is "at or above the lower limit of the range of reasonableness, giving full faith and credit to all of the evidence that tends to support that amount." We are required to take the strongest legitimate view of all the evidence, including all reasonable inferences therefrom, to sustain the verdict; to assume the truth of all the evidence that supports it; and to discard all evidence to the contrary. In this analysis, we do not weigh the evidence, nor do we determine the credibility of the witnesses.

Miller, 970 S.W.2d at 498-99 (bracketing in original) (citations omitted). The principles enunciated in *Miller* are applicable to the plaintiff's issue challenging the adequacy of the jury's verdict in the instant case.

III. *Law Regarding Alteration of Natural Flow of Water*

In Tennessee, “[i]f the owner of higher lands alters the natural condition of his property so that surface waters collect and pour in concentrated form or in unnatural quantities upon lower lands, he will be responsible for all damages caused thereby to the possessor of the lower lands.” **Zollinger v. Carter**, 837 S.W.2d 613, 614-15 (Tenn. Ct. App. 1992). Further, damage to property caused by the adjoining landowner’s “wrongful interference with the natural drainage of surface water ... constitutes an actionable nuisance.” **Butts v. City of South Fulton**, 565 S.W.2d 879, 881 (Tenn. Ct. App. 1977).

IV. *Discussion*

A. Suit Against the Partnership

We start by observing what is clear from the record – the partnership changed the natural state of its property by clearing the land of vegetation, trees, and the like, in order to develop a residential subdivision. What is likewise clear is that this denuding of the land altered the natural flow of surface water so as to discharge it “in unnatural quantities” onto the property of the plaintiff. The partnership does not raise an issue as to this predicate finding by the jury. Even if it had, there is an abundance of evidence to support such a finding. Thus, the only issue as to the award against the partnership is the plaintiff’s contention that it is inadequate.

The plaintiff testified as to various losses resulting from the floods: loss of rental value, damage to the interior of his home after the first four floods, and money spent to repair the home after the 1999 flood, just to mention a few. However, plaintiff offered no precise evidence as to how much of his damages resulted from the 1997 flood, the only flood that occurred while the partnership owned the property. On cross-examination, the plaintiff admitted that he had written a letter to the Federal Emergency Management Agency in June, 1998, in which he stated that \$10,000 would cover only one-sixth of his total restoration damages. Even at that, the evidence is somewhat ambiguous as to which of the floods caused what damage and, more importantly, the monetary amount of the damage caused by the 1997 flood as opposed to the floods that occurred after the partnership ceased to own the property. In any event, extrapolating from the plaintiff’s testimony, one could reasonably conclude that \$60,000 was the monetary amount of the plaintiff’s damages resulting from the pre-June, 1998 flooding. While there are certainly other conclusions that could be deduced from the evidence, our standard of review mandates that we only consider the interpretation of the evidence that tends to support the jury’s verdict. Since the conclusion that the amount of the plaintiff’s damages resulting from the 1997 flood amounted to \$60,000 tends to support the jury’s verdict, it is appropriate that we consider this conclusion in evaluating the adequacy of the jury’s award against the partnership.

An expert witness called by Sanchez testified that the changes to the land made by the partnership increased the flow of water to the plaintiff’s land, at most, by twenty percent. That expert also testified that the flooding on the plaintiff’s property would have occurred regardless of

any changes the partnership made to the land, considering the torrential rainfall that occurred in East Tennessee at the time of the 1997 flood.²

As stated earlier, in evaluating the jury's award, we consider only the evidence supporting that award and disregard all evidence to the contrary. *Miller*, 970 S.W.2d at 498, citing *Poole v. Kroger Co.*, 604 S.W.2d 52, 54 (Tenn. 1980). Our review of the record in this case persuades us that there is material evidence to support the amount of the award against the partnership. As previously indicated in this opinion, the lowest estimate of damages presented by the plaintiff was \$60,000. When this evidence is coupled with the testimony that the partnership increased the flow of water to the plaintiff's property by no more than twenty percent, the record before us would support a finding that the partnership was liable for twenty percent of the \$60,000, or \$12,000. Thus, the lower limit of the range of reasonableness is \$12,000. Since the award of \$15,000 against the partnership is above that lower limit of the "range of reasonableness," we find that there is material evidence to support the jury's verdict against the partnership. Accordingly, we reject the plaintiff's contention that the verdict is inadequate.

B. Suit Against Sanchez

Sanchez argues that the trial court erred in refusing to grant his motion to set aside the verdict and for a directed verdict because, according to him, the plaintiff failed to prove that the floods in 1998 and 1999 were caused, or contributed to, by conduct or omissions on his part. We must first resolve this issue before addressing the plaintiff's argument that the award against Sanchez is inadequate.

Our standard of review of a trial court's decision on a motion for directed verdict is clear. A directed verdict is appropriate only when the evidence is susceptible to but one conclusion. *Eaton v. McLain*, 891 S.W.2d 587, 590 (Tenn. 1994); *Long v. Mattingly*, 797 S.W.2d 889, 892 (Tenn. Ct. App. 1990). We must "take the strongest legitimate view of the evidence favoring the opponent of the motion." *Long*, 797 S.W.2d at 892. In addition, all reasonable inferences in favor of the opponent of the motion must be allowed, and all evidence contrary to the opponent's position must be disregarded. *Eaton*, 891 S.W.2d at 590; *Long*, 797 S.W.2d at 892.

Our review of the record leads us to conclude that the trial court did not err in denying Sanchez's motion for a directed verdict. As we have previously stated, there is ample material evidence in the record to support a finding that the partnership substantially and significantly altered the land and thereby caused damage to the plaintiff's property in 1997. On cross-examination, Sanchez admitted that, after he took the remaining property back from the partnership in April, 1998, he did nothing with the acreage, a tract that previously had been graded and denuded by the partnership. There is material evidence in the record linking Sanchez's passive ownership of the property with the flooding and subsequent damage that occurred on the plaintiff's property in the

² The 1997 flood was described as a 100-year event.

1998 and 1999 floods. The plaintiff's expert witness testified that, in his opinion, the changes that the partnership made to the land increased the run-off of water onto the plaintiff's property. Sanchez did nothing after he acquired the property in 1998 to rectify that which caused the earlier flooding. The trial court acted appropriately in denying Sanchez's motion for a directed verdict.

As to the plaintiff's contention that the award against Sanchez is inadequate, we respectfully disagree. The jury had before it evidence of many contributing factors to the flooding that occurred on the plaintiff's property following the heavy rains in 1998 and 1999. There was evidence that other properties contributed to the flooding on the plaintiff's property; that the plaintiff's house was located in the path of the natural drainage; that the plaintiff had affected the natural flow of the water by construction on his property; and that some flooding would have occurred on the plaintiff's property even had Sanchez's property not been altered. When all of these other contributing factors are taken into account, we cannot say that an award of \$10,000 against Sanchez is less than the amount of damages applicable to his culpability. Accordingly, the plaintiff's issue as to the inadequacy of damages as to Sanchez is found to be without merit.

V. Conclusion

The judgment of the trial court is affirmed. This case is remanded for enforcement of the trial court's judgment and for collection of costs at the trial court level, all pursuant to applicable law. Costs on appeal are taxed to the plaintiff.

CHARLES D. SUSANO, JR., JUDGE